Supreme Court, U.S.
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No. 86-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BENITA T. JONES

Petitioner,

v.

FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS, IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. Does Section 704(a) of Title VII of the Civil Rights Act of 1964 permit an employer to discharge an employee, whose duties include representing it in EEO matters, because that employee engaged in activity that was clearly not protected under Section 704(a).

II. Did the Court of Appeals apply the correct legal standard in reviewing the trial court's decision when the petitioner failed to present any direct evidence of discrimination and when the petitioner failed to show that the respondent's non-retaliatory reasons for its actions were a pretext for discrimination.

LIST OF PARTIES

The Petitioner is Benita T. Jones.

The Respondent is Flagship International, d/b/a Sky Chefs.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF PETITION	1
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI	3
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

Cases	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..	6
Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985)	10
Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972)	9
Hamm v. Members of Bd. of Regents of the State of Fla., 708 F.2d 647 (11th Cir. 1983)	7,9
Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976)	5
Jefferies v. Harris Cty. Comm. Action Ass'n., 615 F.2d 1025 (5th Cir. 1980)	5,9
Jones v. Flagship International, d/b/a Sky Chefs, 793 F.2d 714 (5th Cir. 1986)	4,8,9,10,11
King v. Commission of Internal Revenue, 458 F.2d 245 (6th Cir. 1972)	9
Lee v. Russell Cty. Bd. of Educ., 684 F.2d 769 (11th Cir. 1982)	12
Matter of Legel, Braswell Gov't Sec. Corp., 648 F.2d 321 (5th Cir. 1981)	9
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	3,8,11,12
Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)	8,10
Pendleton v. Rumsfeld, 628 F.2d 102 (D.C. Cir. 1980) ..	6,7
Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981)	4,5,6,9
St. John v. Employment Dev. Corp., 642 F.2d 273 (9th Cir. 1981)	6,9

	Page
Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981)	3,8,11,12
Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985)	10,11
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	8,10,11,12
Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325 (5th Cir. 1980)	7,9
Statute	
42 U.S.C. Section 2000(e), *et seq.*	2

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Respondent, Flagship International, d/b/a Sky Chefs ("Sky Chefs"), submits this brief in opposition to the petition for certiorari filed by Benita T. Jones ("petitioner").

STATEMENT OF THE CASE

Sky Chefs adopts the statement of the case as contained in the opinion of the Court below.

SUMMARY OF PETITION

The petitioner here raises two issues, neither of which are meritorious. First, the petitioner, in a mischaracterization of the opinion below, claims that the Court of Appeals held that

42 U.S.C. Section 2000e, *et seq.*, (hereinafter "Title VII"), and in particular Section 704(a) of Title VII, permits an employer to discharge an employee, whose duties include representing it in EEO matters, solely because the employee filed a charge of discrimination with the EEOC and otherwise engaged in activities protected by Title VII. Second, the petitioner claims that the Court of Appeals applied an incorrect legal standard in affirming the trial court's decision. At least, those are the questions listed by the petitioner as being presented by her petition. However, an examination of the argument contained in the petition shows that the only issue briefed by the petitioner is whether or not the Court of Appeals applied the correct legal standard in affirming the decision of the trial court. In this regard, the petitioner claims that the decision of the Court of Appeals is in conflict with a decision of this Court and a decision of the Eleventh Circuit.

SUMMARY OF ARGUMENT

The decision below is fully consistent with the decisions of this Court and with every relevant Court of Appeals decision addressing the issues presented. Accordingly, the petition fails to satisfy this Court's traditional criteria for review.

While the petitioner contends that the Fifth Circuit held that Section 704(a) of Title VII permits an employer to discharge an employee whose duties include representing it in EEO matters solely because the employee filed a charge of discrimination with the EEOC and otherwise engaged in activities protected by Title VII, even a cursory examination of the opinion below shows that the Fifth Circuit decided, rather, that the petitioner had engaged in conduct that was clearly unprotected by Section 704(a) of Title VII, which such conduct justified her suspension and discharge.

Further, the petitioner represents to the Court that the Fifth Circuit applied an incorrect standard in reviewing the decision of the trial court because she presented direct evidence of a statutory violation by Sky Chefs; thus, the petitioner argues that the Fifth Circuit incorrectly applied the standards of this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248 (1981). Again, the petitioner has mischaracterized, if not misstated, the holding of the Fifth Circuit. An examination of the opinion below shows that the petitioner presented no direct evidence of a statutory violation, but rather, she depended upon inferential evidence to establish a *prima facie* case of retaliation, in response to which Sky Chefs presented legitimate, nondiscriminatory reasons for its action, thereby shifting the burden of persuasion to petitioner to show that a discriminatory reason more likely motivated Sky Chefs or that Sky Chefs' proffered explanation was unworthy of credence. The petitioner failed to do so, and thus the Fifth Circuit affirmed the decision of the trial court.

REASONS FOR DENYING THE WRIT

The issues presented by the petitioner do not satisfy this Court's traditional criteria for certiorari, inasmuch as the Fifth Circuit's decision is fully consistent with every relevant decision addressing the issues presented.

A. The Petitioner's Conduct Was Not Protected

Contrary to the petitioner's bald assertion that, "[i]t is undisputed that the reasons for the adverse action taken against petitioner . . . come within the scope of activity protected by the statute," an examination of the opinion below shows that the Fifth Circuit held that the petitioner's conduct in soliciting or inviting others to join her in her discrimination

claim, coupled with her expressed intent to serve at the vanguard of a class action suit, was not protected under Section 704(a) and provided Sky Chefs with a nondiscriminatory basis upon which to suspend and discharge the petitioner. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d 714, 728 (5th Cir. 1986). In arriving at this conclusion, the Court below indulged in a balancing test requiring (1) that the employee conduct be reasonable in light of the circumstances and (2) that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare. *Id.* at 728. In applying this test, the Fifth Circuit found that the petititoner's conduct in filing a discrimination suit against Sky Chefs, suggesting that a class action suit would follow, and soliciting or inviting others to sue or join in a suit against Sky Chefs not only rendered the petitioner ineffective in the position for which she was employed, but critically harmed Sky Chefs' posture in the defense of discrimination suits brought against the company. *Id.* at 728.

The petitioner has failed to cite any authorities with which she claims the opinion below is in conflict. The reason for the petitioner's failure to do so is simple — there are none. Rather, the opinion below is fully consistent with the relevant decisions addressing the issue presented. For example, in *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981), the Court upheld the grant of a summary judgment to an employer who had discharged a company EEO official who had surreptitiously filed class action discrimination charges on behalf of others. The Ninth Circuit affirmed on the grounds that the plaintiff had "thereby placed himself in a position squarely adversary to his company" and had "thus rendered himself unable to fulfill the functions of his office." The rationale of the Court in *Singer* for imposing special limitations on the right of EEO representatives to assert third-party claims against their employer was

two-fold. First, focusing on the employee's obligations, the Court noted at p. 217:

> The [EEO] position was unique in that it required the occupant to act *on behalf* of his employer in an area where normally action against the employer and on behalf of the employee is protected activity.

As to the second basis for its decision, the Court expressed its concern that if Section 704 were construed to immunize an EEO officer

> to take such action against the company he represents in support not of his own rights but of the perceived rights of those with whom it is his duty to deal on behalf of his company . . . it would render . . . wholly unworkable the program of voluntary compliance which appellant was employed to conduct *Id.* at 217.

The rule announced in *Singer* is an application to the specific circumstances of EEO representatives of the general approach adopted by courts, including the Court below, that not all forms of employee protest or opposition are protected under Section 704:

> Rather, the courts have required that the employee conduct be reasonable under the circumstances, and have held that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his welfare.

Jefferies v. Harris Cty. Comm. Action Ass'n., 615 F.2d 1025, 1036 (5th Cir. 1980), *quoting, Hochstadt v. Worcester Found. for Experimental Biology,* 545 F.2d 222, 233 (1st Cir. 1976).

Employing this balancing test, the Court in *Singer* concluded that throwing the mantel of protection of Section 704

over the EEO representative's efforts to assert claims of others against his employer would not only countenance a breach of the employee's duties, but would also have had a deleterious effect on the achievement of the important purposes of Title VII.

The proper functioning of the framework of Title VII is dependent on the free flow of information between company operating personnel and its representatives in EEO matters. This is so because Title VII places heavy emphasis on voluntary compliance for achieving the goal of equal employment opportunity. *See generally, Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44-45 (1974). This purpose is best served by encouraging corporate decision-makers to be frank and to fully inform their EEO representatives of the circumstances surrounding the action complained of by employees filing charges of discrimination. How else could that representative determine the viability of the company's position in a particular case? Further, one could hardly expect operating management to heed the advice of the company's EEO personnel on compliance matters if, having been entrusted with the protection of the company from legal liability, these same people were free to use what they have learned to the employer's detriment by serving as the focal point for a multiparty action against the employer. The conciliation process and the compelled conformance with the law upon which Title VII so heavily relies would be severely impaired by such a lack of confidence in EEO personnel. *Smith v. Singer Co.*, 650 F.2d at 217; *St. John v. Employment Dev. Corp.*, 642 F.2d 273, 275 (9th Cir. 1981); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980).

Other cases which have considered attempts by EEO officers to take actions on behalf of third parties against their employer's interests have found such conduct to fall outside the protection of Section 704. In *Whatley v. Metropolitan Atlanta*

Rapid Transit Authority, 632 F.2d 1325 (5th Cir. 1980), the court held that the EEO officer had been properly discharged for filing a charge of discrimination on behalf of another employee in a manner contrary to the employer's instruction. In *Pendleton v. Rumsfeld*, 628 F.2d at 102, the Court affirmed a judgment approving the removal of EEO officers who had participated in an employee protest. The Court reasoned that by taking part in the demonstration, the employees had engaged in conduct inconsistent with their duties because they had "... fatally compromised their ability to gain the confidence of middle management," thereby reducing their ability to achieve the voluntary compliance so heavily relied upon by Title VII. *Id.* at 108.

Lastly, in *Hamm v. Members of Bd. of Regents of the State of Fla.*, 708 F.2d 647, 653-654 (11th Cir. 1983), the Eleventh Circuit, emphasizing the duty of loyalty owed to the employer, affirmed the district court's judgment that the employer had properly removed an EEO specialist who, through a variety of actions, had sought to function as an advocate on behalf of "aggrieved employees," stating that:

> An employer may remove any employee from a position similar to that at issue here without violating Title VII based on the manner in which the employee undertakes his or her duties.

In sum, the decision below is fully consistent with other decisions addressing the issue of the type of conduct that is and is not protected under Section 704.

B. The Court Below Utilized the Proper Standard in Examining the Decision of the District Court

Next, the petitioner claims that the Court below utilized an improper standard in reviewing the decision of the trial

court. The petitioner's argument is as follows: she claims that she presented direct evidence of a statutory violation by Sky Chefs and that therefore, the test for the marshaling of proof as announced by this Court in the *McDonnell Douglas* and *Burdine* context is inappropriate. Instead, the petitioner argues that Sky Chefs should have been required to prove that it would have suspended and discharged Jones even in absence of her so-called proof of a direct statutory violation, citing this Court's opinions in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985) and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). However, an examination of the opinion below and the record shows that there was no direct evidence of a statutory violation by Sky Chefs in suspending and terminating the petitioner from her employment.

First, the petitioner incorrectly argues that her suspension and subsequent termination were based solely upon her action in filing charges of discrimination with the EEOC, but the opinion below flatly refutes that contention. The petitioner also seems to urge that her suspension and termination should be reviewed as separate adverse employment decisions. As the Court below stated, the trial court treated Sky Chefs' conduct on the whole as a single adverse action. Sky Chefs believes that this was appropriate inasmuch as the petitioner's conduct amounted to a single act, involving three elements: (1) the filing of the charge, (2) suggesting that a class action would follow and (3) soliciting or inviting others to sue or join in a suit against Sky Chefs. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 728. However, the Fifth Circuit noted that if the petitioner's suspension was viewed as a separate, single adverse employment decision, it does not follow that Sky Chefs' action constituted unlawful retaliation. *Id.* at 725. Given Jones' position as manager of EEO programs, Sky Chefs believes that her suspension with pay may well have been justified on the basis of her filing charges alone, in order to

avoid the conflict of interest inherent in Jones' representation of Sky Chefs before the agency to whom she had made the complaint. *See, St. John v. Employment Dev., Corp.,* 642 F.2d at 273; *Barela v. United Nuclear Corp.,* 462 F.2d 149, 152 n.5 (10th Cir. 1972); *see also, Hamm v. Members of Bd. of Regents of the State of Fla.,* 708 F.2d at 647; *Smith v. Singer Co.,* 650 F.2d at 214; *Jefferies v. Harris Cty. Comm. Action Ass'n.,* 615 F.2d at 1025; *Whatley v. Metropolitan Atlanta Rapid Transit Authority,* 632 F.2d at 1325. However, the Fifth Circuit did not find it necessary to decide the extent to which an employer may act in relieving an employee of her EEO duties without running afoul of Section 704(a) or whether Sky Chefs' response, if based on the petitioner's filing of charges alone, was sufficiently excessive to constitute unlawful retaliation, because the record established that the petitioner was suspended *with pay,* "not only for the conflict of interest stemming from her position as an EEO officer, but for [her] plan to initiate a class action suit against the company."[1] *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 726. In this regard, the evidence is absolutely clear that on February 11, 1982, when Vygantas, the officer responsible for the petitioner's suspension and discharge, learned of the petitioner's filing of her charge of discrimination, he also knew of her threat to file a class action against the company; and he suspended the petitioner the next

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[1] At page 16 of her petition, the petitioner maintains that the Court below made an independent review of the evidence and made a finding that one of the reasons for the petitioner's suspension and termination was the threat of a class action. This representation is totally fallacious. The evidence with regard to the petitioner's threat to file a class action was undisputed. Thus, the trial court was not required to make a fact finding in this connection, and the Court below was entitled to consider this undisputed evidence just as much as the trial court. *King v. Commissioner of Internal Revenue,* 458 F.2d 245 (6th Cir. 1972); *Matter of Legel, Braswell Gov't. Sec. Corp.,* 648 F.2d 321, 326 n. 8. (5th Cir. 1981).

day. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 717 and 726-727 n. 14. Vygantas' testimony is equally clear that he suspended the petitioner for the combination of the two reasons. Certainly these acts rendered the petitioner ineffective in the position for which she was employed.

The fallacy of the petitioner's argument is that she tries to separate the two actions that she made simultaneously and then claim that one was protected, and thus bring herself within the purview of this Court's decisions in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. at 111 and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. at 274. While the petitioner attempts to separate her two actions that led to her suspension, they are in fact inseparable.[2] It should also be borne in mind that the trial court found that Sky Chefs "had reasonable grounds, or in good faith thought it did . . . for suspending and later terminating Jones," *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 724, which finding is a conclusion that Sky Chefs did not engage in unlawful retaliation. *Id.* at 725. This finding bears directly upon Sky Chefs' motivation for suspending the petitioner; and determinations regarding motivation and intent depend upon complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder. *Thornbrough v. Columbus and Greenville R.R. Co.,* 760 F.2d 633, 641 (5th Cir. 1985) This finding was not clearly erroneous and is based on credible evidence. *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564 (1985); and it should not be disturbed by the petitioner's attempt here to separate the two simultaneous acts upon which

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[2] The petitioner obviously believed there was a connection between the two because she testified that the very charge she had filed was itself then intended to be a class-wide, multiparty claim of discrimination. (1R 46, 54-58; 4R 19-21 and Exhibit 1 thereto).

Sky Chefs "had reasonable grounds" for "suspending... Jones."

However, even if there is direct evidence of a statutory violation by Sky Chefs, the petitioner's argument still fails, for the simple reason that there is no direct evidence whatsoever to indicate that the petitioner's filing of a charge had anything to do with her termination. If the petitioner's argument is accepted at face value, there is only direct evidence in the record to indicate that her filing of the charge of discrimination was one of the reasons for her suspension. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 726-727 n. 14. An examination of the opinion and record below shows that there is no direct evidence of any kind that the petitioner's filing of a charge of discrimination had anything to do with her termination. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 714-715 n. 3. Rather, the petitioner must rely solely upon the fact of her filing a charge as inferential evidence to make out a *prima facie* case; and inasmuch as the petitioner was paid during her suspension, *Id.* at 726, the petitioner's argument here becomes an academic exercise of little or no value.

Thus, the petitioner was relegated to the *McDonnell Douglas* and *Burdine* allocation of burdens and order of presentation of proof in a Title VII case. The shifting burdens of proof set forth in *McDonnell Douglas* and *Burdine* are specifically designed to assure that the plaintiff has her day in court despite the unavailability of direct evidence. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. at 111; *Thornbrough v. Columbus and Greenville R.R. Co.,* 760 F.2d at 638. It was under the *McDonnell Douglas* and *Burdine* allocation of burdens and order of presentation of proof that the Fifth Circuit decided that the petitioner's conduct in soliciting or inviting others to join in her discrimination claim, coupled with her expressed intent to

serve at the vanguard of a class action suit, was not protected under Section 704(a) and provided Sky Chefs with a nondiscriminatory basis upon which to suspend and discharge the petitioner. The Fifth Circuit then held that the petitioner failed to present evidence to show that Sky Chefs' stated reasons were a pretext for discrimination. Inasmuch as there was no direct evidence of a statutory violation by Sky Chefs in the petitioner's discharge, the petitioner was certainly relegated to the *McDonnell Douglas* and *Burdine* allocation and tests, and the Fifth Circuit utilized the proper legal standard in reviewing the decision of the trial court. Thus, there is no conflict between the opinion below and this Court's opinion in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. at 111 or the opinion of the Eleventh Circuit in *Lee v. Russell Cty. Bd. of Educ.,* 684 F.2d 769 (11th Cir. 1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas L. Case, a member of the Bar of this Court, hereby certify that on this 23rd day of December, 1986, three copies of the Brief of Respondent, Flagship International, d/b/a Sky Chefs, in Opposition to Petition were mailed, first-class postage prepaid, certified mail return receipt requested, to Mr. Morris W. Thompson, 904 West 2nd Street, Little Rock, Arkansas 72201, counsel for the petitioner. I further certify that all parties required to be served have been served.

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